IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. WENDY SUE ANDERSON, Petitioner.	)	2 CA-CR 2006-0426-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023089

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

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By Patrick C. Coppen
Tucson
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Wendy Anderson was convicted of manslaughter, criminal damage, and two counts of aggravated assault. On the night of October 2, 2002, Anderson's vehicle had collided with a motorcycle driven by Lee H., which resulted in serious injuries to Lee and the death of his passenger, his son. The trial court sentenced

Anderson to a presumptive, 10.5-year prison term for manslaughter, to be followed by three concurrent terms of probation on the other counts. We affirmed her convictions and sentences on appeal. *State v. Anderson*, No. 2 CA-CR 2003-0376 (memorandum decision filed Sept. 30, 2004).

¶2 Anderson then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., in which she asserted claims of ineffective assistance of counsel at trial and sentencing, newly discovered evidence of jury misconduct, and sentencing error based on a change in the law as announced by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Although Anderson never sought leave to amend her petition, *see* Rule 32.6(d), she titled her reply "Supplemental Briefing Supporting Petition for Post Conviction Relief" and subsequently filed new affidavits and other documents to support numerous additional allegations she raised in her reply. The trial court summarily denied relief, and this petition for review followed.

¶3 Anderson maintains the trial court erred in failing to grant a new trial or, at a minimum, conduct an evidentiary hearing on what she contends are "multiple colorable claims." A court must conduct an evidentiary hearing if a defendant's petition states a "colorable claim," that is, "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). We review a trial court's denial of post-conviction relief only for an abuse of discretion, *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), and find none here.

Ineffective Assistance of Trial Counsel

¶4 To establish counsel was ineffective, a defendant must show (1) counsel's performance was objectively unreasonable under prevailing professional standards and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to establish one requirement, a court need not address the other. *State v. Rosas*, 183 Ariz. 421, 422, 904 P.2d 1245, 1246 (App. 1995).

¶5 Anderson contends trial counsel was ineffective because she agreed to permit Anderson's trial to be videotaped for inclusion in a national network television program and failed to have an independent toxicology test performed in a timely manner on blood that was drawn from Lee on the night of the collision.

Consent to Television Coverage

¶6 With her post-conviction petition, Anderson submitted the affidavits of trial counsel and Wanda Day, a Tucson criminal defense attorney. Anderson also submitted, with her reply, the affidavit of Brick Storts, another local criminal defense attorney. Both Day and Storts opined that an attorney's agreement to have a client's criminal trial filmed for broadcast on television is ineffective assistance and that, in light of the particular circumstances of Anderson's case, Anderson's counsel had been ineffective in agreeing to participate in the television program.

¶7 Trial counsel averred that, when she was approached about participating in the project, she "believed it presented a potential opportunity for Ms. Anderson—in particular to ensure and facilitate fair deliberations by the jury." Counsel said she "personally had no aversion to cooperating" in the television project but had "allowed Ms. Anderson to make the decision as to whether she and [counsel] would participate."

¶8 In denying post-conviction relief, the trial court reasoned that participation in the videotaping project had been approved, as a general matter, by the Arizona Supreme Court and that agreeing to take part in the program could therefore not have been per se ineffective assistance. The court also noted that trial counsel's affidavit established she "initially believed there was some tactical benefit to be gained by participating in the project." Although trial counsel stated that she later came to believe that the Pima County Attorney had been affected by the presence of national media and, as a result, had failed to engage in plea negotiations, nothing in counsel's affidavit suggested she had changed her initial opinion that participating in the project would be advantageous during Anderson's jury trial. According to the trial court, Anderson could have withdrawn from the project at any time. The trial court concluded that continued participation in the project was a reasoned tactical decision by both counsel and Anderson. "[D]isagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). We find no abuse of discretion in the trial court's determination

that Anderson failed to state a colorable claim for ineffective assistance of counsel on this ground.

Delay in Obtaining Analysis of Victim's Blood

¶9 In her petition below, Anderson asserted that trial counsel was ineffective in failing to request an independent toxicology test of Lee's blood immediately upon learning that a sample of his blood had been drawn on the night of the collision. Although trial counsel had moved to compel the state to have the sample tested, and the court ordered that the test be performed by December 23, 2002, it was not performed until February 18, 2003. Before trial, the state successfully moved to exclude the test results based on the testimony of David Spirk, a criminalist at the Arizona Department of Public Safety Crime Laboratory. He testified at the hearing on the motion that Lee's blood sample contained carboxytetrahydrocannabinol, a nonpsychoactive metabolite of tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana. Spirk explained that THC is rapidly metabolized in a person's body and is only detectable in the blood for two to three hours after a person uses marijuana. Spirk also testified that even if THC is contained in a blood sample when drawn, "the THC, will break down, over time, in the blood after it is collected." Based on tests he had performed and the criteria established by the state crime laboratory, Spirk was unable to conclude whether Lee had had THC in his bloodstream at the time of the collision and could offer no opinion about whether Lee had been impaired.

¶10 As part of her post-conviction petition, Anderson submitted an opinion letter from Raymond Kelly, a forensic toxicologist, who stated that THC typically disappears from a blood sample over time and that delaying analysis of a blood sample can result in a negative THC test result. Kelly disputed Spirk's conclusion that no THC was present in Lee's blood sample and, after "[c]ombining the ranges" in two different scientific models, suggested Lee might have used marijuana no longer than "5.5 hours before the accident."

¶11 On this issue, the trial court concluded: "There is no reason given why Defendant's trial counsel should have asked for release of the untested vial sooner. It was a tactical decision to await the results of the State's testing before incurring the added cost for independent testing and the retention of another expert."[1] The court also concluded that Kelly's opinion letter "d[id] not establish a colorable claim for relief" because it was not offered under oath and failed to show that Kelly's methodology was "acceptable in the scientific community." We find no abuse of discretion in the court's conclusions. We add that, for reasons addressed in our decision on appeal, Anderson is also unable to establish prejudice resulting from this alleged error.

¶12 On appeal, Anderson had argued the trial court had committed reversible error by precluding evidence of Lee's blood test results. We explained that to find Anderson guilty, the jury had been required to find that she had been the legal and proximate cause

[1]We note that although Anderson argued below that "[s]ince [Lee had] admitted there was marijuana in his blood, time was of the essence," she failed to show evidence that her attorney was aware of any such admission before Lee's blood was tested in February 2003.

of the death and injuries and that Lee's actions were not a superseding event. We noted that "[t]he probative value of [Lee]'s blood test results was weak," but also emphasized that "the jury was informed of all the facts about [Lee]'s reckless driving and was properly instructed that it could exonerate Anderson if it found [Lee]'s supervening acts were 'unforeseeable and when, with the benefit of hindsight, [Lee's acts] may be described as abnormal and extraordinary.'" Thus, we concluded it would have been improper for the jurors to "consider evidence of [Lee]'s alcohol or drug use rather than simply determining whether [Lee]'s actions were a supervening cause of the accident." No. 2 CA-CR 2003-0376, ¶¶ 10-11.[2] In light of our disposition on appeal, trial counsel's failure to request an independent test of Lee's blood sample was neither deficient nor prejudicial. *Cf. State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (nondisclosure does not warrant new trial absent reasonable probability disclosure would have changed outcome).

Ineffective Assistance of Sentencing Counsel

¶13 In her post-conviction petition, Anderson argued sentencing counsel was ineffective in failing to state specific mitigating factors and failing to speak with the prosecutor about recommending that Anderson receive a mitigated sentence. The trial court addressed these issues in its order, noting that "[t]he mitigation information argued in the Rule 32 Petition[] was all presented prior to or at the sentencing." Accordingly, the court concluded that counsel's performance was not deficient and that Anderson was not

[2]Anderson's petition for review of our decision was denied.

prejudiced by counsel's conduct at sentencing. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

¶14 Anderson argues the court erred in so ruling, asserting sentencing counsel "failed to present available pertinent mitigating evidence prejudicing Petitioner in violation of" the holding in *State v. Carriger*, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982). But Anderson does not dispute that the court at sentencing was aware of all of the mitigating circumstances she identified in her petition below. Although sentencing counsel focused his remarks on Anderson's remorse, her efforts to rehabilitate herself, and her ties to the community rather than on her psychological history, this was not a case in which counsel's performance "approached that of a neutral observer." *Id*.

¶15 Moreover, the trial court sentenced Anderson after reviewing the presentence report, letters submitted on her behalf, and documents from counseling classes she had attended. We defer to the trial court's determination that any alleged error in counsel's performance would not have changed Anderson's sentence. *See State v. Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d 63, 69 (2006) (colorable claim for ineffective assistance of counsel requires showing of "'reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different'"), *quoting Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

Newly Discovered Evidence

¶16 To warrant post-conviction relief based on newly discovered evidence, the material must meet five requirements: the

> evidence must be newly discovered, the motion must show due diligence, the evidence must not be merely cumulative or impeaching, the evidence must be material, and the evidence must be likely to change the verdict if it were introduced at trial.

State v. Nordstrom, 200 Ariz. 229, ¶ 89, 25 P.3d 717, 743 (2001). For due diligence, a defendant "must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention." *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶17 In her petition for post-conviction relief, Anderson argued that the broadcast of the television program, which included some of the jury deliberations, showed that "several jurors clearly ignored the jury instructions . . . . [and] concluded that Ms. Anderson's driving under the influence was the sole determinant [of] whether she committed manslaughter." In her reply, which Anderson titled a "supplemental briefing," Anderson alleged additional claims of newly discovered evidence and separately filed the following documents: (1) an affidavit by Anderson's present counsel claiming the state had engaged in misconduct by failing to submit Lee's blood sample for analysis until January 29, 2003, despite a court order that the testing be performed by December 23, 2002; (2) an affidavit by a juror, R., averring she "actually originally believed that Defendant was not guilty and felt pressured to give in to the other jurors due to the TV camera present during deliberations" and would have been influenced by evidence that Lee "was high on marijuana" on the night of the accident; (3) affidavits by other jurors suggesting it might have "made a difference" in their deliberations if evidence had been presented that Lee was

impaired at the time of the collision; (4) an affidavit by an investigator working for Anderson's present counsel stating Lee and his son "had been at [a] party immediately prior to the collision"; and (5) Anderson's affidavit suggesting the state had used an inaccurate wheel base measurement for her vehicle and the hospital where Lee was transported might have conducted a drug screen on his blood or urine that night.

¶18 The trial court ruled Anderson had improperly raised these claims for the first time in her reply to the state's response. The court also concluded that Anderson had failed to show due diligence in discovering the evidence of the state's alleged improper delay in testing Lee's blood sample, Lee's alleged whereabouts before the accident, and the state's use of an allegedly erroneous accident reconstruction factor, as required by Arizona law. *See State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000) (post-conviction relief on ground of newly discovered evidence requires showing that evidence "could not have been discovered and produced at trial through reasonable diligence").

¶19 With respect to Anderson's claim that jurors improperly concluded that evidence of her impairment was sufficient to find her guilty of manslaughter, the trial court stated: "The Defendant relies on a few snippets of the deliberation that was broadcast as part of the . . . telecast. The parties and the Court are not privy to the full deliberations and from what context those broadcast snippets were taken . . . . The Court presumes the jury will follow its instructions." The trial court also rejected Anderson's claim that the jurors' affidavits established a colorable claim for relief because

> [t]he Affidavits are based on the assumption that the victim was, in fact, "high on marijuana at the time of the accident". This was not the evidence presented at trial for the jury's consideration. To impeach the jury's verdict on "facts" not presented to the jury is improper.

Apart from its conclusion that Anderson had improperly presented her "new evidence" arguments and juror affidavits for the first time in her reply, the trial court did not specifically address R.'s averment that she had "felt pressured to give in to the other jurors due to the TV camera present during deliberations."

¶20 Anderson argues the trial court erred by summarily denying relief on her claim of newly discovered prosecutorial misconduct. This claim was based on her attorney's representation that Spirk had recently told him Lee's blood sample had not been delivered to the crime laboratory for analysis until late January 2003. If this allegation is true, we do not condone testing delay caused by the state, the state's failure to obey a court order, or the state's lack of candor with the court regarding the status of testing. However, we cannot say the trial court abused its discretion in light of our decision on appeal upholding the trial court's preclusion of Lee's blood test results, in part, because they were not probative of whether Lee's allegedly reckless driving might have been a superseding event affecting Anderson's criminal responsibility. No. 2 CA-CR 2003-0376, ¶¶ 10-11.

¶21 Anderson also argues that R.'s assertion that she had been influenced by media coverage "showed with 'specificity' that the presence of the camera in jury deliberations 'impaired the ability of the jurors to decide the case on only the evidence before them,'"

quoting Chandler v. Florida, 449 U.S. 560, 581, 101 S. Ct. 802, 813 (1981). In *Chandler*, the defendants had challenged a Florida Supreme Court rule permitting televised coverage of criminal trials over the defendants' objections. *Id*. at 567, 101 S. Ct. at 806. Relying on principles of federalism, the Supreme Court declined to hold that "a denial of due process automatically result[ed]" from Florida's rule. *Id*. at 579, 101 S. Ct. at 812. While recognizing that "[t]he risk of juror prejudice is present in any publication of a trial," the Court suggested "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of [the] case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly." *Id*. at 575, 101 S. Ct. at 810. Thus, the Court held, for a defendant to prevail on a claim that media coverage denied the due process right to a fair trial, the defendant must demonstrate specific prejudice. *Id*. at 581, 101 S. Ct. at 813.

¶22 Anderson not only failed to file R.'s affidavit until after the state had responded to her petition, thereby depriving the state of an opportunity to challenge the characterization of the affidavit as newly discovered evidence, she also failed to cite *Chandler* below and has made this argument for the first time in her petition for review. In response to the state's argument that Anderson could not invade the province of the jury, Anderson had replied only that her newly discovered evidence, including R.'s affidavit and other materials first filed with Anderson's reply, "concern[ed] real jury misconduct in which a person's liberty has been affected." The same claim might be made by most defendants

challenging jury deliberations; in Arizona, however, a juror's failure to follow the law is not a basis for impeaching a verdict. *See State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988) (evidence jurors misapplied burden of proof on insanity defense "relate[d] to the juror's mental processes" and was inadmissible to support request for new trial based on juror misconduct); *State v. Covington*, 136 Ariz. 393, 396-97, 666 P.2d 493, 496-97 (App. 1983) (verdict cannot be impeached on ground jurors relied on defendant's failure to testify; "inquiry into the subjective motives or mental processes of the jurors" is prohibited).

¶23 In Arizona, impeachment of a jury's verdict, for the purpose of granting a new trial, is governed by Rule 24.1(d), Ariz. R. Crim. P., 17 A.R.S., which provides: "No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." In the proceeding below, Anderson failed to argue any legal basis for the trial court to conclude that R.'s affidavit constituted an exception to this rule.

¶24 A trial court should have a "meaningful opportunity to consider" an issue before it is addressed by this court. *State v. Lichon*, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989); *see generally* Ariz. R. Crim. P. 32.9. To provide such an opportunity, a petitioner is required to cite relevant legal authorities. Ariz. R. Crim. P. 32.5. Under these circumstances, we cannot say the trial court abused its discretion in denying relief on Anderson's claim.

Conclusion

¶25 In sum, as to each of the claims she has raised on review, Anderson has failed to establish that the trial court abused its discretion in denying post-conviction relief. Accordingly, although we grant review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge